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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROLAND M. ATTENBOROUGH, Plaintiff and Respondent, v. REISH LUFTMAN REICHER & COHEN, Defendant and Appellant.	B218931 (Los Angeles County Super. Ct. No. BC300235)

APPEAL from a judgment of the Superior Court of Los Angeles County, Conrad Aragon, Judge. Affirmed.

Winston & Strawn, Laura R. Petroff and Jennifer Rappoport; Sanchez & Amador and S. Shane Sagheb for Defendant and Appellant.

Prince & Heuer and Henry T. Heuer for Plaintiff and Respondent.

Defendant and appellant Reish & Reicher, formerly Reish Luftman Reicher & Cohen ("the Firm") appeals from a judgment after court trial in favor of its former partner, plaintiff and appellant Roland Attenborough. At issue were payments owed Attenborough, upon his departure from the Firm, pursuant to two agreements: (1) a Deferred Compensation Agreement ("DCA"); and (2) a Stock Redemption Agreement ("SRA"). The amounts owed pursuant to the DCA and SRA were not in dispute; nor was the Firm's right to make those payments by assignment of accounts receivable (for which Attenborough was the billing partner) rather than cash. The matter proceeded to trial on the sole issue of whether the Firm breached the implied covenant of good faith and fair dealing by engaging in efforts to collect on Attenborough's clients' accounts receivable for nine months after Attenborough left the Firm, whereupon it kept the proceeds and then assigned Attenborough the remaining worthless bad debt. The trial court entered judgment in favor of Attenborough. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Firm appeals from the judgment entered after the second trial in this matter. Attenborough had initially pleaded numerous causes of action seeking relief on multiple theories. The trial court resolved several causes of action against him on a motion for judgment on the pleadings, and the matter proceeded to a bench trial on the rest, resulting in a judgment in favor of Attenborough for breach of the DCA only. Both parties appealed. In our nonpublished opinion in *Attenborough v. Reish Luftman Reicher & Cohen* (Feb. 27, 2008, B183960), we reversed the judgment for breach of contract, and affirmed in all other respects, with the exception that Attenborough be granted leave to amend his complaint to allege a breach of the implied covenant of good faith and fair dealing with respect to the DCA and SRA. Specifically, the trial court had mistakenly concluded that the DCA expressly forbade the Firm from paying the amounts due under the DCA by assigning accounts receivable that were more than 120 days old. The DCA had no express provision.[1] However, we concluded that Attenborough should have been granted permission to allege that the assignment of *worthless* accounts receivable in lieu of cash payments due under the DCA and SRA violated the covenant of good faith and fair dealing implied in both contracts. We therefore remanded for further proceedings.

On remand, Attenborough amended his complaint as permitted and the case proceeded to trial. The evidence at trial revealed the following facts. Attenborough left the Firm, on unfriendly terms, on May 9, 2002. The amount due him under the SRA was $45,000. The amount he was due under the DCA was $114,992.84. Despite the assertions of the firm administrator, Lissa Marcus, to the contrary, both of these amounts were capable of determination shortly after Attenborough left the firm.[2] Thus, the Firm indisputably owed Attenborough $159,992.84 upon his departure.

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[1] At one point, the DCA referred to the subtraction of accounts receivable which were over 120 days old. This, however, referred to a step in the calculation of the amount of deferred compensation owed, not the accounts receivable which could be assigned in lieu of cash payment of the compensation due.

[2] Marcus had originally testified that the amount under the DCA depended on Attenborough's partnership "points," which could not be calculated until the end of the fiscal year, which was the calendar year. However, she later conceded that the

Both the DCA[3] and the SRA[4] allowed the Firm to elect, "in its sole discretion" to make the payments to Attenborough by assignment of accounts receivable for which Attenborough was the billing attorney. Evidence suggested that these terms were added to the DCA and SRA at least in part because a previous attorney, Art Grebow, had left the Firm "with tremendous bad unbilled time and bad accounts receivable." The Firm's partnership, including Attenborough, did not want a departing partner to be paid in full in cash under the DCA and SRA yet still leave the firm with a large amount of uncollectible receivables.[5]

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necessary figure did not depend on Attenborough's points for the year in which he departed, but actually depended on his points in the six months *prior* to his departure, which could have been immediately calculated.

[3] The DCA provided: "At the election of the [Firm], in its sole discretion, payment of the Deferred Compensation Benefit may be in the form of an assignment to Employee of accounts receivable owed to the [Firm] by or unbilled time for clients of the [Firm] for whom Employee will continue to render legal services following, or for whom Employee was the responsible (billing) attorney prior to, the occurrence of [termination of employment]. Such receivables may be assigned in satisfaction of the Deferred Compensation Benefit on a dollar-for-dollar basis."

[4] The SRA provided: "At the election of the [Firm], in its sole discretion, payment of the Redemption Price may be in the form of an assignment to the Shareholder of accounts receivable owed to the [Firm] by or unbilled time for clients of the [Firm] for whom the Shareholder will continue to render legal services following, or for whom the Shareholder was the responsible (billing) attorney prior to, the occurrence of [termination of employment]. Such receivables may be assigned in satisfaction of the Redemption Price on a dollar-for-dollar basis."

[5] Although Attenborough did not dispute the Firm's evidence on this point, it is somewhat questionable. The Firm relied on a memo created by Leland Reicher which proposed the numerous changes to the SRA. The paragraph allowing payment by assignment of accounts receivable was intended "to deal with the Art Grebow situation." While the memo proposed some changes to the DCA as well as the SRA, it did not propose any changes to the DCA to allow payment by accounts receivable.

At the time of Attenborough's May 9, 2002 departure from the firm, he had $229,747.97 in accounts receivable.[6] Two accounts, however, made up more than half that amount. According to Firm records, as of April 30, 2002, Punch Press Products, Inc. ("Punch Press") had an outstanding balance of nearly $88,000. Its most recent payment, of $20,000, had been made on April 1, 2002. Firm records showed that Dispatch Transportation, Inc. ("Dispatch") owed nearly $45,000, and had not made a payment since the end of 2001.

The Firm did not immediately pay Attenborough the amounts due under the DCA and SRA, in either cash or receivables. Instead, it waited to see whether Attenborough's clients would pay the amounts due. The Firm was aware that the older a receivable it is, the less likely it is to be collectible. Indeed, the Firm had a general rule that, for the first 90 days, the accounting department attempts to collect a bill. Thereafter, the billing attorney is responsible for the collection effort. If, after the second 90-day period, there is no substantial payment made or written payment plan in place, the firm will write off the outstanding balance and close the matter in the billing

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Moreover, computer records indicate the memo was created on November 18, 1996, some *nine months after* the February 1, 1996 DCA and SRA which contained the relevant provisions. At the very least, the memorandum proferred by the Firm could not possibly have been dated in November 1996. At worst, the fact that the memo proposed the change only to the SRA suggests that the accounts receivable term was *not* added to the DCA "to deal with the Art Grebow situation."

[6] The Firm's calculation of Attenborough's deferred compensation benefit involved determining Attenborough's "Vested Receivables." One number in that calculation is "the accounts receivable shown on the books of the [Firm] . . . as of the end of the month in which the [termination of employment] occurs attributable to clients originated by [Attenborough]." That number is $229,747.97.

system. A letter is sent to the client advising that the firm will no longer represent the client.

After Attenborough left the Firm, Marcus made some attempts to collect from his clients, particularly Punch Press and Dispatch. Marcus's collection efforts were limited to making telephone calls. She called Punch Press and "kept getting the run-around, and nobody would call [her] back." Eventually, the last person at Punch Press to whom Marcus was directed refused to take her calls.[7] As to Dispatch, Marcus's collection efforts were unsuccessful because, to her knowledge, Dispatch left the firm and followed Attenborough to his new practice.[8] At no point did Marcus, or anyone at the Firm, contact Attenborough and seek his assistance in collecting this, or any other, debt. Nor did the Firm immediately transfer the accounts receivable of Attenborough's clients to him.

Marcus did not attempt to collect from all of Attenborough's clients. She testified that the Firm "probably called at least 70 percent" of the clients whose accounts were ultimately assigned to Attenborough. Marcus's collection efforts achieved limited success. After Attenborough left the Firm, the Firm obtained at least $13,000 from his

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[7] Attenborough testified that the Punch Press matter involved a "DOL investigation," and the Firm would not be paid until the investigation was complete.

[8] The record does not indicate how many of Attenborough's clients went with him; however, in the Firm's trial brief, it asserts that "many" of the clients for whom he ultimately was assigned accounts receivable went with him.

clients.[9] As to the clients who did not pay, Marcus testified that one indicated that it would not pay because it was not happy with the work. According to Marcus "a lot of people said that they weren't going to pay because the billing was over the amount that was quoted to do the work." However, this explanation was not attributed to Punch Press or Dispatch, the clients with the two largest amounts unpaid.

By September 10, 2002, the Firm received the last payment it would receive on the accounts at issue. By December 3, 2002, it had officially closed the few accounts on which it had received partial payments after Attenborough's departure. Under the Firm's general practice of writing off accounts with no collections or payment plans within six months, Attenborough's remaining accounts would have been closed by this time as well.

On February 14, 2003, nine months after Attenborough's departure from the firm, five months after the last payment on the accounts was received, and two months after the last accounts were officially closed, the Firm assigned to Attenborough 23 accounts receivable in purported payment of its obligations under the DCA and SRA. The two largest accounts were Punch Press ($82,598.14) and Dispatch ($44,137.95). The next largest had a balance of $11,703.57, and 11 of the 23 accounts had balances of less than $1,000 each. The total of all balances due was $179,423.99, an amount in

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[9] Evidence was only introduced as to how much the Firm collected on the accounts of the receivables which were ultimately assigned to Attenborough. There was no evidence introduced as to whether the Firm collected any other receivables attributable to his clients. If the accounts ultimately assigned constituted all of the remaining accounts receivable attributable to Attenborough, the Firm would have collected over $50,000 on his accounts.

excess of the $159,992.84 admittedly owed. The Firm, however, believed the accounts were not collectible at this point. Indeed, Reicher testified that "it had become clear" that the clients were not going to pay any more (or, at least, "highly unlikely" that they would), so the Firm did not wait *any longer* to assign the accounts to Attenborough.[10]

Attenborough rejected the assignment, and made no attempt to collect on the accounts. Attenborough testified that he generally collects 97 to 98% of his billings. Had he remained at the Firm and continued to service the clients, he believed his realization rate would have remained the same.

Evidence indicated that the Firm treated Attenborough differently than other departing attorneys who were assigned their receivables in lieu of payments. Two such attorneys were assigned the receivables within three months of their departure.

The trial court concluded that there was no justification for the nine-month delay in assigning the accounts receivable to Attenborough. As such, the court concluded that the assignment of bad debt in lieu of cash payments under the DCA and SRA constituted a breach of the implied covenant of good faith and fair dealing. The court therefore entered judgment in favor of Attenborough in the amount of $159,992.84. The Firm filed a timely notice of appeal.

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[10] The DCA contained a term requiring payment to be made "as soon as practicable after the Termination Date, but in no event later than six (6) months after the end of the fiscal year in which the Termination Date occurs." Reicher believed that he therefore could have waited until the end of June, 2003, to make the assignment.

ISSUE ON APPEAL

While the Firm phrases its challenge to the judgment in several different ways, it is, at root, arguing that substantial evidence does not support the trial court's judgment. We disagree and affirm.

DISCUSSION

1. *Standard of Review*

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

2. *The Implied Covenant of Good Faith and Fair Dealing*

" ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' " (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371.) "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Id*. at p. 372.) However, "[i]t is universally recognized [that] the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Id*. at p. 373.) "[W]hile the implied covenant requires mutual fairness in applying a contract's actual terms, it cannot substantively *alter* those terms." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 327.) "The covenant of good faith and fair dealing . . . exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." (*Id*. at p. 349.) To establish a claim for breach of the implied covenant, a plaintiff must establish that the defendant either lacked subjective good faith in the validity of its act, or "the act was intended to and did frustrate the common purpose of" the agreement. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1123.)

In this case, it is undisputed that the DCA and SRA gave the Firm discretion to make its payments to Attenborough by means of assignment of accounts receivable in lieu of cash. It is also undisputed that part of the reason for this contractual term was so that the Firm would not have to pay a departing attorney cash amounts when the attorney was leaving the Firm with a large amount of uncollectible receivables. Nonetheless, the trial court found, and we agree, that the implied covenant was violated by the Firm's nine-month attempt to collect as much as it could from the receivables, and assignment to Attenborough of their worthless remains.

The Firm argues that: (1) the language in the DCA and SRA was specifically intended to permit the assignment of uncollectible receivables; and (2) no delay in payment is actionable as the DCA specifically permitted payment "as soon as practicable"[11] but no later than six months after the end of the fiscal year. The Firm argues that it met the outside deadline for assignment, and that an earlier assignment would not have been practicable as it did not then know to what extent the receivables were collectible.[12] As its acts were expressly permitted by the contract, the Firm argues that these acts could not be the basis for a finding of breach of the implied covenant. The Firm's argument is based on an improper separation of acts which, in the aggregate, constituted a breach of the implied covenant.

Accepting that the DCA and SRA were amended to allow the assignment of accounts receivable for the purpose of avoiding the situation where the Firm would

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[11] The SRA has no "as soon as practicable" language, but instead requires payment, "in equal monthly installments over twelve (12) months, with the first payment due thirty (30) days after the date of the [termination of employment]." Neither party appears to rely on this term.

[12] Alternatively, the Firm argues in its reply brief that any breach of the "as soon as practicable" language would constitute an *express* breach of contract, which would not be enforceable as a breach of the *implied* covenant. As this point was raised for the first time in a reply brief, we need not consider it. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) In any event, the Firm's breach of the implied covenant was not its delay in payment alone, but its delay combined with its other acts.

make a cash payment to a departing attorney and nonetheless end up with a large amount of bad debt, the reasonable interpretation of this provision is to allow the firm to assign the receivables to the departing attorney in lieu of a cash payment shortly after the departing attorney leaves the firm, but before the receivables become stale. In other words, the departing attorney would receive no cash payment from the Firm, and the burden of attempting to collect on the presumably difficult accounts would fall to the departing attorney.

The Firm chose not to do this. Instead, the Firm chose to wring as much cash out of the accounts as possible for itself, and then, when the accounts were too old for any further likely collection, assign them to Attenborough. In its brief on appeal, the Firm argues that it acted in good faith and "in a manner that would have been to Attenborough's benefit, if only his clients had paid their bills." We reject the argument. The Firm conceded in its trial brief the obvious fact that a "departing [attorney] would be in a better position to collect on those receivables, as he would have a continuing relationship with the clients who followed him to his next law firm." Indeed, Marcus testified that she met with no success in collecting the second largest account, that of Dispatch, because the client had followed Attenborough to his new firm. Clearly, Attenborough would have had a better chance at collecting on this account had he immediately been assigned the receivable, but the Firm instead waited nine months, in order to pursue its own, less effective, collection efforts.[13]

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[13] The Firm argues that Attenborough would not have had any better luck in collecting its accounts because many of the clients felt they had been overbilled. But

The Firm's intent to deprive Attenborough of the benefits of the contract may be inferred by its actions. At the time Attenborough left the firm, he had $229,747.97 in receivables and the firm owed him $159,992.84 under the DCA and SRA. The Firm did not simply choose $159,992.84 of the receivables and assign them to Attenborough in lieu of cash, and concentrate its collection efforts on the remaining $69,755.13. Instead, the Firm wanted to collect as much as it could, without any regard to the facts that: (1) Attenborough would have a better chance of recovering from those clients who followed him to another firm; and (2) the longer it delayed in assigning receivables to Attenborough, the less likely it would be that they would be collectible. The firm waited seven months, during which time it sent some bills and made some phone calls, although it admittedly did not contact all of the clients at issue. It collected some amounts, which it kept for itself. Then it closed the files and waited another two months, just to make certain no more money would come in.

The express terms of the contracts permit the Firm, in its sole discretion, to assign a departing partner accounts receivable in lieu of payments due. The implied terms of the contracts permit the Firm to do so even when the accounts receivable are considered uncollectible. But the implied covenant of good faith and fair dealing does not permit the Firm to hold on to the receivables, collecting what it can, until it is assured that they are no longer worth anything to anyone, and then assign them in lieu

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Marcus did not testify that this was the reason Punch Press and Dispatch, the clients with the two largest accounts, did not pay. Indeed, Dispatch did not pay the Firm because it had followed Attenborough to his new firm.

of payments due. The evidence supports the conclusion that this is what the Firm did, and we will therefore affirm.[14]

[14] The Firm also argues that Attenborough failed to mitigate damages by failing to urge his clients and former clients to cooperate with the Firm's collection efforts. As the Firm never sought this assistance, we see no basis to impose on Attenborough a duty to assist the Firm in its collections. At oral argument on appeal, the Firm suggested such a duty is imposed by section 5.18 of the SRA, which provides that a departing partner "will use his best efforts to help" the Firm collect on accounts receivable, and "will not take any action which would interfere" with the Firm's collection efforts. As Attenborough was not asked to help, we do not believe his failure to attempt collection efforts on the Firm's behalf violates this provision.

The Firm also suggests that the damages are speculative as Attenborough has not proven that he would have collected on the receivables had they been promptly assigned. But Attenborough's undisputed collection rate is 97 or 98%, and the Firm noted in its trial brief that many of his clients followed him to his new firm. There is no reason to believe that Attenborough could not have retained a similar high collection rate, at least for those clients who stayed with him. Moreover, had Attenborough been timely assigned the accounts receivable, he certainly would have collected the amounts the Firm collected and kept. As it was the Firm's own conduct which prevents us from ever knowing precisely how much Attenborough would have collected, we conclude this evidence was sufficient to render the damages award not speculative.

DISPOSITION

The judgment is affirmed. Attenborough shall recover his costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.